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July 16, 2015

PROTECTED MATERIAL
TO BE DISCLOSED IN ACCORDANCE WITH
GAO PROTECTIVE ORDER

VIA E-MAIL

Paula J. Haurilesko
Senior Attorney
Government Accounting Office
Washington, DC 20548

Re: Protest of Marianas Management Corporation, B-411593
Protestor Comments
Our File No.: 128442-202297

Dear Ms. Haurilesko:

Marianas Management Corporation ("MMC") submits these Comments in response to the Agency Report and in support of MMC's protest of the award of the new construction lease for the United States District Courthouse on the island of Saipan.

1. **The Agency Incorrectly Asserts that MMC Challenges the RFP's Delineation of the Tsunami Inundation Zone.**

Contrary to the Agency's argument, MMC does not challenge the delineation of the Tsunami Inundation Zone in the Request for Lease Proposals' (RPL, Agency Ex. 19). MMC challenges the Agency's *ex post facto* interpretation of the Zone to fit the award to EFC. The RLP language states that the Zone is defined, in part, as:

> 1/4 mile inland from the shoreline (high-water mark) from Puntan Susupe, north to Micro Beach/Puntan Muchot, unless site at minimum 30 free elevation above sea level." (Agency Ex. 19, p. 5).

It is not disputed, and is indisputable, that the EFC site is located less than ¼ mile from the shoreline and is north of Puntan Susupe and south of Puntan Muchot, on the same side of the island (the west side) as these two Points. (Exhibit 25).[1] The Agency argues that the EFC site was not to be included in the defined because the Agency did not intend to include in the Tsunami Zone the coastal area as the coastline wraps south and east from Puntan Muchot – but that's not what the RLP language says. There is no such exclusion from the Tsunami Zone in the language of the RLP.

The Agency attempts to support its claimed interpretation by pointing to a shaded area on a map submitted as Agency Exhibit 26. However, Agency Exhibit 26 was not part of the RLP and was only produced in response to MMC's initial agency protest. Reading the actual language of the RLP places the EFC site within the Tsunami Zone as defined by the RLP. If the RFP intended to exclude the area to the south of Puntan Muchot along Smiling Cove it should have states so, but it does not. The Agency cannot now change the language of the RLP to justify its award decision.

[redacted] (b)(4)

To qualify for the elevation exception in the RLP, the entire site must be at an elevation of 30 feet, not just a portion of the site. (Agency Ex. 19, p. 5). While the agency contends in a footnote that the EFC "building" will be above an elevation of 30 feet, the RPL elevation requirement is not for the building, but for the "site" and EFC admits in its proposal that the entire site is not at 30 feet.

This elevation deficiency is highlighted by MMC's survey's report attached to the Fred Camacho Declaration (Exhibit 29) as Exhibit A, which shows the front elevation of the "office campus" comprising the proposed building is only at an elevation of 9 feet. *Id.* This "office campus" delineation is important because the only way the EFC site complies with the RLP requirement that it be within 200 feet of a designated arterial is by considering the entire office campus for which it is a part. *See* Agency Report n. 8.

MMC's reference in its Protest to the site elevation, the location and elevation of the only ingress and egress route to the site (at only 9 feet) and to the 2013 NOAA *Tsunami Hazard Assessment Special Series: Vol. 3*, which was relied upon by the Agency to define the Tsunami Zone in the RLP, is to demonstrate the unreasonable limitation placed on the interpretation of the RLP language by the Agency. The stated purpose of the Tsunami Inundation Zone restriction was to protect the "safety, security, and well-being of the occupants and visitors of the Premises, . . ." (Agency Ex. 19, p. 5). Under the Agency's unreasonable interpretation of the Zone, it is placing those occupants and visitors at risk by putting them at a 9 foot elevation, only .15 miles from the shoreline, that during a Tsunami event can expect 7 meter waves (23 feet) traveling at 8 meters per second (26 feet per second). (MMC Exhibit 15). An unreasonable interpretation of

[1] Submitted with MMC's GAO Protest but originally provided by the Agency as Agency Exhibit 25.

RFP language by an Agency, such as this, can be the basis to sustain a protest. *In re Raytheon Co.* B-404998, July 25, 2011, 2011 CPD ¶ 232 at 37.

In the present case, the Agency's unreasonable interpretation of the RLP involves a mandatory proposal requirement of a life/safety nature. For this reason alone, MMC's protest should be sustained.

2. The EFC Site is Not Within the Required Distance of Amenities.

The EFC site is indisputably in excess of the ½ mile proximity to adequate eating facilities. [redacted] (b)(4) [redacted] The Agency measurements to the various restaurants and other amenities in the area are simply wrong. MMC has double checked these figures and they comport with the longer distances admitted by EFC. (Exhibit 29, Fred Camacho declaration and Exhibit A thereto). Furthermore, the Agency reliance on its own research of establishments within the ½ mile, but not relied upon by EFC as qualifying, is highly questionable. As seen in the attached Declaration of Fred Camacho, and Exhibit B thereto, the one restaurant noted by the Agency as being within ½ mile is a small establishment with a gravel parking lot, situated between a dilapidated barbeque stand and a massage parlor. The other two "grocery stores" are actually small convenience stores, and unlike the case cited by the Agency in support of grocery stores qualifying as eating facilities, these stores have no delicatessen. *Id.* [redacted] (b)(4)

The issue then becomes, can "Agency discretion" be used to inflate the express distance limitation for amenities in RLP by some 50% (the difference between ½ and ¾ miles)? Agency discretion is not unfettered and cannot be unreasonable and must be consistent with the evaluation criteria. *In re Phair Sec. Solutions, Inc.*, B-406566, May 31, 2012, 2102 CPD ¶ 194 at 10. Under the criteria of the RLP, the proximity to eating facilities was "not to exceed[] a walkable ½ mile, . . ." (Agency Exhibit 19, p. 5). Thus, the proximity requirement was not to be determined by driving distance, but by walking distance. Under this standard, the Agency determination is simply unsupported and unreasonable. Specifically, the Supervisory Realty Specialist, who purported to verify the distances, drove the distances and did not walk them. (Agency Exhibit 22, ¶ 9). There was no determination by the Agency that the distances were walkable, let alone that the additional ¼ mile distance was walkable. An evaluation unsupported by the record is unreasonable and a selection decision based that unsupported evaluation is likewise unreasonable. *In re ITT Sys. Corp.*, B- 405865, Jan. 6, 2011, 2012 CPD ¶ 44 at 13.

Therefore, and for this additional reason, EFC's proposed site should have been rejected by the Agency as non-compliant with the requirements of the RLP and MMC's protest should be sustained.

3. MMC's Proposal was Incorrectly Evaluated

As an initial matter, it should be noted that the Source Selection Authority (SSA) concluded that MMC's proposal was eligible to receive the award. Agency Exhibit 15 p. 4. Thus, although the Agency gave MMC lower technical scores than EFC, if EFC's site is disqualified for the reasons stated above, MMC should be awarded the lease. A non-compliant offer, even with higher technical scores, still does not comply with the RLP and should be disqualified. *See Federal Builders, LLC—The James, R. Belk Trust*, B-409952, Sept. 26, 2014, 2014 CDP ¶ 285, p. 3 (protest of lease award sustained where awardee proposal was found non-compliant.)

(1) Price Comparison With Technical Factors: From the newly disclosed documents, it was learned that the SSA made the assumption that the difference in price, with MMC's price being lower, was insufficient to allow MMC to improve its offer to make up for its technically lower scores. There is, however, no calculation or reasoning for this statement. It is merely an unsupported conclusion. Therefore the determination that EFC's higher technical scores outweighed MMC's lower price is not reasonably supported by the record. "Conclusory statements, devoid of any substantive content, . . . fall short of this documentation requirement." *Serco Inc. v. United States*, 81 Fed. Cl. 463, 497 (2008).

(2) No Credit Giving To Mr. Dan Reitner: The Agency admits it gave no credit for the addition of Project Manager team member Dan Reitner despite his extensive credentials. It was error to give no credit and the case cited by the Agency is inapposite. In that case, the contesting offeror failed to state that the consultant would work on the project at all and failed to provide a resume. *Mesa, Inc.*, B-254730, Jan. 10, 1994, 94-1 CPD § 62, n. 3. Contrary to *Mesa, Inc.*, Mr. Reitner was "brought on" to the project and his extensive Curriculum Vitae was submitted. (See MMC Exhibit 1).

(3) Erroneous Evaluation Of Past Performance Reference. As noted in the Protest, the Agency downgraded MMC's Proposal a full 40% (scored 6 out of 10) based on what is described as one "marginal" Reference for MMC's Architect. However, this one reference averaged a score of 8 out of 10, not 6 out of 10. Further, the fact that this Reference came from a tenant improvement project is not an irrelevant factor as contended by the Agency. It explains why certain factors were rated lower – they were not part of the tenement improvement type project. Finally, the Agency does not explain why MMC's request to have the Reference disregarded bears any relation to how the reference is evaluated. That fact is simply irrelevant to the Reference's favorable evaluation.

(4) Improperly Penalizing MMC's Facility Design, Site Layout and Site Specifics As Incomplete At The "First Generation Plans" Phase. First, the Agency is incorrect that MMC did not raise the fact that the RLP only required "first generation plans" at the Agency level. It was specifically addressed in MMC's April 22, 2015, Protest Reply, p. 4, attached hereto as

Exhibit 31.[2] Second, MMC's plans, its site layout and its site location complied with the requirements of the RLP and its proposal was considered acceptable. As such, there were no material items missing from the proposal that would disqualify the proposal. The complaint of the Agency is the level of detail, not the compliance with necessary factors, and as noted in the initial protest, the RLP did not call for the level of detail for which the Agency has downgraded MMC. Thus, the Agency's scoring for the Facility Design, Site Layout and Design, and the Site/Location was improperly based on unstated factors.

4. MMC is Entitled to Award of the Lease

The Agency is incorrect when it states that MMC cannot be awarded the lease because the Agency has already executed the lease with EFC. Both the statute, 31 USC § 3554(b)(E), and the case cited by the Agency, *Adelaide Blomfield Mgmt. Co.*, B-2531282, Sep. 27, 1993, 93-2 CPD ¶ 97, allow for the termination of an executed contract if it is determined to be in the best interest of the government – even if that means the government must pay damages. It is within the discretion of the Comptroller General. *Id.* at p. 6 (termination not "recommended" due to damages attributable to breach of contract.) In this case, the disqualifying factor for the EFC site, that is that it is within the Tsunami Inundation Zone, is a matter of life/safety, and it should be the overriding factor weighing in favor of terminating the EFC lease and awarding the lease to MMC.

In the alternative, and as acknowledged by the Agency, MMC should be awarded its costs in preparing the proposal and its attorneys' fees.

For the reasons stated above, MMC's protest should be sustained.

Very truly yours,

(b) (6)

William J. Ohle

cc: Marilyn M. Paik, GSA Assistant Regional Counsel

[2] Furthermore, the Agency cites to no authority that an issue must first be raised at an Agency level protest in order to be preserved for a later GAO level protest.